STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: November 9, 2021)

AO ALFA BANK,		
	Plaintiff,	
v.		**C.A. No. WM-2020-0361**
JOHN DOE, et al.,		
	Defendants.	

DECISION

TAFT-CARTER, J. Before this Court for decision is a Motion to Quash Subpoena and for Protective Order from non-party April Lorenzen (Ms. Lorenzen), founder of cybersecurity firm Zetalytics, and the objection to that motion from AO Alfa Bank (Alfa Bank). Additionally, Alfa Bank has submitted its Motion to Compel, to which Ms. Lorenzen objects. Jurisdiction is pursuant to G.L. 1956 §§ 9-18.1-3, 9-18.1-5, and 9-18.1-6, as well as Rules 45 and 26 of the Superior Court Rules of Civil Procedure.

I

Facts and Travel

Alfa Bank is a Russian banking institution that has filed a Complaint against unknown John Doe Defendants in the Fifteenth Judicial Circuit of Florida. (Ms. Lorenzen's Mem. Supp. Mot. Quash, Ex. A (Fla. Compl.), ¶¶ 12-13.) In its Complaint, Alfa Bank asserts two counts against John Doe Defendants under the Florida Civil Remedies for Criminal Practices Act (Florida RICO). *Id.* ¶¶ 67-82; *see* Fla. Stat. Ann. §§ 772.101 *et seq*. Alfa Bank alleges that unknown actors, the John Doe Defendants, perpetrated a series of cyberattacks in 2016 and 2017 against Alfa Bank and the Trump Organization. (Fla. Compl. ¶¶ 2, 3.) The John Doe Defendants allegedly executed the

scheme by manipulating the Domain Name System (DNS)[1] process to create the "false appearance of a covert communication channel between Alfa Bank and the Trump Organization[.]" *Id.* ¶¶ 5-7. In filing its lawsuit, Alfa Bank seeks "to recoup its losses by identifying the unknown actors who carried out the cyberattacks, obtaining complete relief from those actors, and restoring its global reputation as the leading private bank in Russia." *Id.* ¶ 2.

Alfa Bank maintains that the John Doe Defendants purposefully planted false DNS data and shared this information with a group of anonymous researchers (the Anonymous Researchers or the Researchers)—a group described as a "Union of Concerted Nerds"—who were working together to investigate potential malfeasance due to reports of Russian interference in a United States presidential election. *Id.* ¶¶ 7, 42. Alfa Bank alleges that Ms. Lorenzen is one of the Anonymous Researchers who actively participated in the collection of the DNS data purportedly flagged and provided by the John Doe Defendants. *See* Pl.'s Mem. Opp'n Mot. Quash 9-11; Pl.'s Mem. Supp. Mot. Compel 6-9; *see also* Fla. Compl. ¶¶ 42-43 (describing Anonymous Researchers). Once in possession of the DNS data, Alfa Bank alleges that the Anonymous Researchers compiled the information and hypothesized reasons for the suspicious activity between Alfa Bank and the Trump Organization. (Fla. Compl. ¶¶ 44-45.) The Researchers purportedly would not have known about this activity but for the actions taken by the John Doe

[1] In basic terms, DNS is "the protocol that allows us to type email addresses and website names to initiate communication." (Ms. Lorenzen's Mem. Supp. Mot. Quash, Ex. D (Slate.com Article, *Was a Trump Server Communicating with Russia?*).) When an individual utilizes the internet, DNS servers must communicate with one another to ascertain the IP address of the e-mail account or website being requested. *Id.* As such, communications between DNS servers can be compiled as data and "[c]omputer scientists have built a set of massive DNS databases, which provide fragmentary histories of communications flows[.]" *Id.* Metaphorically speaking, those scientists "have cameras posted on the internet's spotlights and overpasses. . . . [and] are entrusted with something close to a complete record of all the servers of the world connecting with one another." *Id.*

Defendants. *Id.* ¶ 47. The Anonymous Researchers shared their findings with various news organizations and on the internet as well. *Id.* ¶ 50. One of the Anonymous Researchers is known by the pseudonym "Tea Leaves." *Id.* ¶ 43. According to Alfa Bank, Tea Leaves acts as one of the Researchers' key leaders, thereby making them a person of great interest for Alfa Bank. *See id.* ¶¶ 43, 50.

Alfa Bank alleges that the cyberattacks by the John Doe Defendants took place within two specific time frames. First, it asserts that between May and September of 2016 "a series of up to 100 or more separate but related attacks" occurred when the John Doe Defendants "sent 'spoofed' emails purporting to come from the Trump Organization to Alfa Bank." *Id.* ¶¶ 6, 34. Second, Alfa Bank avers that on February 18, 2017, March 11, 2017, and March 13, 2017, the John Doe Defendants conducted additional cyberattacks by manufacturing and sending over 20,000 DNS requests for invalid domain names to Alfa Bank. *Id.* ¶¶ 8, 37-39.

Alfa Bank claims that it has conducted a reasonable search to identify the John Doe Defendants and that the John Doe designation "serves as a placeholder until Alfa Bank is able to conduct discovery and uncover the actual names of [those] Defendants." *Id.* ¶ 14.

After initiating its lawsuit, Alfa Bank filed thirty-nine subpoenas with the Fifteenth Judicial Circuit of Florida. (Ms. Lorenzen's Mem. Supp. Mot. Quash, Ex. C (Court Docket in Matter of *AO Alfa-Bank v. John Doe*, C.A. No. 50-2020-CA-006304-XXXX-MB) (Fla. Docket).) The Fifteenth Judicial Circuit issued a subpoena duces tecum without deposition for Ms. Lorenzen on August 21, 2020, and a subpoena for a remote videotaped deposition on April 16, 2021. *Id.* On September 3, 2020, Alfa Bank requested that this Court issue a foreign subpoena for document production (the Document Subpoena) directed to Ms. Lorenzen, which was issued by the Court Clerk on September 8, 2020. *See* Foreign Subpoena (Sept. 8, 2020). In the following months,

counsel for Alfa Bank and Ms. Lorenzen were in communication concerning the Document Subpoena. *See* Pl.'s Mem. Supp. Mot. Compel, Exs. H, I, J. In a February 15, 2021 letter, Alfa Bank limited the Document Subpoena to the following two requests:

> "1. Communications, documents, and computer data, concerning (i) allegations of secret communications between the Trump Organization and Alfa Bank; (ii) servers or domains registered to the Trump Organization and/or Alfa Bank; or (iii) analysis of computer data related to either the Trump Organization or Alfa Bank.
>
> "2. Communications, documents, and computer data, including but not limited to IP addresses or account names, relating to individuals or entities that queried, accessed, or otherwise performed analyses regarding the Trump Organization or Alfa Bank servers or domains, including any DNS queries or other DNS activity in the ZETAlytics DNS database." (Pl.'s Mem. Supp. Mot. Compel, Ex. J (Letter from Margaret E. Krawiec to Gerald J. Petros dated Feb. 15, 2021) (Feb. Krawiec Letter), at App. A.)

Ms. Lorenzen did not respond to the Document Subpoena. *See* Docket. Alfa Bank then requested the issuance of a foreign subpoena on April 26, 2021, for Ms. Lorenzen to appear for a videoconference deposition (the Deposition Subpoena). *Id.* The Clerk of this Court issued the Deposition Subpoena that same day. *Id.* On May 20, 2021, Ms. Lorenzen filed her Motion to Quash that Subpoena. *Id.* On June 18, 2021, Alfa Bank filed its Motion to Compel Ms. Lorenzen's response to the Document Subpoena, accounting for the modified requests contained within the February 15, 2021 letter. *Id.* The Court heard arguments for the two motions on July 23, 2021, and now renders its Decision on both motions.

II

Standards of Review

A

Discovery

In Rhode Island, "discovery rules are liberal and have been construed to 'promote broad discovery.'" *DeCurtis v. Visconti, Boren & Campbell, Ltd*., 152 A.3d 413, 421 (R.I. 2017) (quoting *Henderson v. Newport County Regional Young Men's Christian Association*, 966 A.2d 1242, 1246 (R.I. 2009)). As a result, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" Super. R. Civ. P. 26(b)(1). Moreover, "[t]he court is bound . . . to give the concept of relevancy, as it applies to discovery purposes, a liberal application[.]" *Borland v. Dunn*, 113 R.I. 337, 341, 321 A.2d 96, 99 (1974).

While Rhode Island discovery is broad, "the imposition of an unreasonable burden is an abuse of the discovery process and will not be tolerated." *Eleazer v. Ted Reed Thermal, Inc.*, No. C.A. 87-624, 1989 WL 1110555, at *1 (R.I. Super. Jan. 27, 1989). As such, "[a] litigant may not engage in merely speculative inquiries in the guise of relevant discovery." *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1328 (Fed. Cir. 1990). Moreover, courts are not "free-standing investigative bodies whose coercive power may be brought to bear at will" against private individuals and entities. *Houston Business Journal, Inc. v. Office of Comptroller of Currency, U.S. Department of Treasury*, 86 F.3d 1208, 1213 (D.C. Cir. 1996). Rather, courts are called to "facilitate" and aid in the resolution of justiciable actions brought before them. *See id.*

The limitations placed on discovery guide a court's adjudication of discovery disputes and motions because, "[a]lthough mechanisms for effective discovery are essential to the fairness of our system of litigation, . . . they also carry significant costs[.]" *Chudasama v. Mazda Motor Corp.*,

123 F.3d 1353, 1367 (11th Cir. 1997). In addition to the general limitations placed on the use of discovery, non-parties are entitled to special protections from burdens created by the discovery process. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998); *Exxon Shipping Co. v. United States Department of Interior*, 34 F.3d 774, 779 (9th Cir. 1994); *see also Ceroni v. 4Front Engineered Solutions, Inc.*, 793 F. Supp. 2d 1268, 1277 (D. Col. 2011).

Finally, it is well settled that the trial court has broad discretion over matters of discovery. *See Martin v. Howard*, 784 A.2d 291, 296 (R.I. 2001) (citing *Colvin v. Lekas*, 731 A.2d 718 (R.I. 1999)); *see also Bashforth v. Zampini*, 576 A.2d 1197, 1201 (R.I. 1990). This discretion extends to motions to compel and quash discovery. *Colvin*, 731 A.2d at 720 (citing *Corvese v. Medco Containment Services, Inc.*, 687 A.2d 880, 881 (R.I. 1997)).

B

Third-Party Actions and Subpoenas

As an initial matter, John Doe actions are recognized under Rhode Island Law. General Laws 1956 § 9-5-20 provides that:

> "Whenever the name of any defendant or respondent is not known to the plaintiff, the summons and other process may issue against him or her by a fictitious name, or by such description as the plaintiff or complainant may select; and if duly served, it shall not be abated for that cause, but may be amended with or without terms as the court may order."

Nevertheless, our courts have held that there is a due diligence obligation imposed on a plaintiff to identify and name the John Doe defendants, where possible, "in order to bring the real defendant into the litigation and to subject that defendant to the jurisdiction of the particular court by proper reasonable notice and diligent service." *Grossi v. Miriam Hospital*, 689 A.2d 403, 404 (R.I. 1997).

Rule 45(a)(1)(D) of the Superior Court Rules of Civil Procedure authorizes the issuance of subpoenas for the purpose of commanding non-parties to the action to "attend and give testimony

or to produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things in the possession, custody, or control of that person[.]" Importantly, non-party subpoenas still require the application of "[t]he broad standard of relevance contained in Rule 26(b)[.]" Robert B. Kent et al., *Rhode Island Civil Procedure* § 45:4 (Updated Dec. 2020).

Rules 26(c) and 45(c) set forth protections for a non-party subject to subpoenas. Pursuant to Rule 26(b)(1) of the Superior Court Rules of Civil Procedure, "[i]t is not ground for objection [to a discovery request] that the information sought will be inadmissible at the trial[.]" Moreover, Rule 26(c) governs the issuance of protective orders and provides that, on a motion by a party "accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown," a court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" A party must provide a particularized need for protection to establish good cause. *Estate of Chen v. Lingting Ye*, 208 A.3d 1168, 1172-74 (R.I. 2019). Courts "shall" quash a subpoena "if it fails to allow reasonable time for compliance, requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden." Kent et al., cited *supra*, § 45:5 (citing Super. R. Civ. P. 45(c)(3)). Courts must then "balance the competing interests between a party's right to discover relevant and nonprivileged information that may be pertinent to his or her case or defense and the harm that may be caused to the deponent if such a deposition were to take place." *Estate of Chen*, 208 A.3d at 1175.

Additionally, a court "may" quash a subpoena if the "subpoena requires the recipient to disclose trade secrets, other confidential research, development, or commercial information, or an

unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party[.]" Kent et al., cited *supra*, § 45:5 (citing Super. R. Civ. P. 45(c)(3)). However, "if the inquiring party can show a substantial need for the testimony or material that otherwise cannot be met without undue hardship[,]" then the court may choose not to quash the subpoena. *Id.*

III

Analysis

A

Governing Procedural Law

Under the Uniform Interstate Depositions and Discovery Act, "[w]hen a party submits a foreign subpoena to a clerk of the superior court in this state, the clerk, in accordance with the court's procedure, shall promptly issue a subpoena for service on the person to which the foreign subpoena is directed." Section 9-18.1-3(b). In addition, a foreign subpoena must:

> "(1) Incorporate the terms used in the foreign subpoena;
>
> "(2) Contain or be accompanied by the names, addresses, telephone numbers, and email addresses of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel; and
>
> "(3) Otherwise be in a form that complies with the laws of this state." Section 9-18.1-3(c).

If these requirements are met, then the Rhode Island Superior Court Rules of Civil Procedure govern the subpoena. *See* § 9-18.1-5. Moreover, an application for a protective order or to quash such a subpoena must "comply with the rules or statutes of this state[.]" Section 9-18.1-6.

Here, Alfa Bank filed the foreign subpoenas on September 3, 2020 and April 23, 2021. The Court Clerk then promptly issued foreign subpoenas, which contained the proper information,

incorporated the terms of the foreign subpoenas, and otherwise complied with the aforementioned sections. Therefore, the Rhode Island Superior Court Rules of Civil Procedure and the laws of the State of Rhode Island govern the subject subpoenas and associated motions. *See* §§ 9-18.1-5, 9-18.1-6.

B

Relevancy and Abuse of Discovery Mechanisms

Ms. Lorenzen argues that Alfa Bank's use of subpoenas amounts to a "fishing expedition" because Alfa Bank's lawsuit and bases for subjecting her to discovery are suspicious and speculative. (Ms. Lorenzen's Mem. Supp. Mot. Quash 9-11; Ms. Lorenzen's Mem. Opp'n Mot. Compel 19-21.)

In response, Alfa Bank contends that Ms. Lorenzen "perversely faults Alfa Bank for diligently pursuing discovery to name Defendants in the Florida action[,]" and argues that its assiduous pursuit of discovery does not transform its efforts into a fishing expedition. (Pl.'s Mem. Opp'n Mot. Quash 17.) Alfa Bank therefore challenges Ms. Lorenzen's abuse of discovery argument, maintaining that its use of subpoenas is entirely appropriate in the context of a John Doe action. *Id.*

Pretrial discovery mechanisms, including depositions, are important procedures because they serve various functions to advance legal actions toward final resolution. *See Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947). That said, "discovery may be denied where, in the court's judgment, the inquiry lies in a *speculative* area." *Micro Motion, Inc.*, 894 F.2d at 1326 (emphasis added). Such a denial is appropriate when a party fails to satisfy the relevancy requirement set forth in Rule 26(b)(1), which is not satisfied when the inquiry is predicated merely on a party's

suspicion or speculation. *Id.* (citing *Mahoney v. United States*, 233 Ct. Cl. 713, 717-19 (1980); *Missouri Pacific Railroad Co. v. United States*, 338 F.2d 668, 671-72 (Ct. Cl. 1964)).

1

Objection to Deposition Subpoena

It is undisputed that Ms. Lorenzen is not a named defendant in the Florida action. Furthermore, it is not alleged in the Complaint that she is an accomplice to the cyberattacks. *See generally* Fla. Compl. There is no doubt that the alleged cyberattacks have been the subject of thorough investigation. The FBI and the Senate Intelligence Committee spent considerable time investigating the issue to determine the root cause of the DNS data that supposedly linked Alfa Bank to the Trump Organization. *See* Ms. Lorenzen's Mem. Opp'n Mot. Compel, Ex. A (Senate Intelligence Committee Report).

Yet, it seems clear that, through its initiation of discovery, Alfa Bank seeks to conduct its own investigation to obtain facts surrounding the alleged scheme as well as unmask the identities of the Anonymous Researchers. Alfa Bank surmises that it is "unlikely that the researchers could have identified the data without knowing to look for it, given the sheer volume of DNS data." (Fla. Compl. ¶ 47.) Additionally, Alfa Bank speculates that Ms. Lorenzen shares close professional connections with Tea Leaves, other Anonymous Researchers, and individuals involved in "reviewing, analyzing, and distributing the DNS data fabricated by [the] Defendants[.]" This conjecture has led Alfa Bank to conclude, based upon news articles, that Ms. Lorenzen might be Tea Leaves. (Pl.'s Mem. Opp'n Mot. Quash 8-11, 26.) In addition, the subpoena issued in Florida—providing the basis for the Deposition Subpoena issued by this Court—fails to specifically list the subjects or areas of inquiry. *See* Subpoena for Remote Video Conference and Videotaped Dep. (submitted as basis for Rhode Island Deposition Subpoena on Apr. 26, 2021).

Rather, it only states that "[t]he oral examination will continue from day-to-day until completed and is being taken for the purpose of discovery, for use at trial, or for such other purposes as are permitted under the rules of the Court." (Subpoena for Remote Video Conference and Videotaped Dep. (Apr. 16, 2021) 2.) This boilerplate language would provide Alfa Bank with an unfettered ability to probe any discovery topic it wishes, rather than the stated objective of inquiry: the identities of the Anonymous Researchers. The requests are broad, excessive, indefinite, and in excess of Alfa Bank's needs. *See Giannini v. Nationwide Insurance Co.*, C.A. No. 89-5833, 1991 WL 789882, at *2 (R.I. Super. Sept. 17, 1991) (quashing subpoena). Clearly, Alfa Bank's requests equate to a fishing expedition, fail to satisfy the relevancy requirement, and constitute an abuse of discovery.

Furthermore, the mechanism Alfa Bank has utilized to seek the identity of a John Doe Defendant from a non-party is not narrowly tailored. Here, Alfa Bank is utilizing this Court as a "free-standing investigative bod[y] whose coercive power[s] may be brought to bear at will" through discovery. *See Houston Business Journal, Inc.*, 86 F.3d at 1213. That is not the proper function of this Court or of our discovery process. The purpose of discovery is to "secure the just, speedy, and inexpensive determination of every action." Super. R. Civ. P. 1(a). Discovery mechanisms have been said to serve several distinct purposes:

> "(1) to narrow the issues and to focus upon the true areas of dispute; as such discovery is an adjunct to the system of simplified pleading contemplated by Rules 7 and 8;
> "(2) to obtain evidence for use at the trial and to disclose where and how evidence may be obtained;
> "(3) to expose fraudulent or groundless claims;
> "(4) to eliminate unfair surprise;
> "(5) to further the use of the expanded summary judgment procedure (Rule 56) through the development of facts which are truly not in dispute; and

> "(6) to facilitate settlement by exposing the strength of the adversary's case and by furnishing factual data as to its value." Kent et al., cited *supra*, § 26:1 at 259.

Clearly, Alfa Bank's purposes in requesting the Deposition Subpoena are in excess of the role of discovery. Therefore, Ms. Lorenzen's objection is sustained.

2

Objection to Document Subpoena

Alfa Bank asserts that the documents it seeks from Ms. Lorenzen are highly relevant because its requests are "aimed at discovering documents that will lead to information about the initial set of fabricated DNS data to which Defendants pointed Tea Leaves or others; how that data was accessed; how Defendants developed and executed the plan to manipulate the DNS data; and, ultimately, the identities of [the] Defendants[.]" (Pl.'s Mem. Supp. Mot. Compel 15.) Alfa Bank stresses the time frame of their requests, which are "limited, ranging from 2016 . . . through the present." *Id.* at 16 (citing *In re Asbestos Litigation*, No. CIV. A. 01-0696, 2002 WL 1378965, at *6 (R.I. Super. June 20, 2002)). In response, Ms. Lorenzen contends the Document Subpoena constitutes an abuse of Rhode Island discovery mechanisms because Alfa Bank's underlying lawsuit is too speculative and therefore the information Alfa Bank seeks through the Document Subpoena is not relevant for purposes of discovery. (Ms. Lorenzen's Mem. Opp'n Mot. Compel 19-22.)

Clearly, requests for the identification of John Doe Defendants to provide the name, addresses, and contact information of the Defendants is permitted. *See, e.g.*, *Berlin Media Art E.K. v. Does 1 through 146*, No. S-11-2039 KJM GGH, 2011 WL 4056167, at *2 (E.D. Cal. Sept. 12, 2011) (granting leave to conduct expedited discovery through use of Rule 45 subpoenas seeking "information sufficient to identify each Doe defendant by name, current and permanent address,

telephone number, and e-mail address"); *UMG Recordings, Inc. v. Doe*, No. C 08-1193 SBA, 2008 WL 4104214, at *4-5 (N.D. Cal. Sept. 3, 2008) (granting leave to conduct expedited discovery in the form of Rule 45 subpoenas seeking documents including the name, current and permanent address, telephone number, e-mail address, and Media Access Control addresses to identify the defendant); *Arista Records LLC v. Does 1–43*, No. 07cv2357–LAB (POR), 2007 WL 4538697, at *1–2 (S.D. Cal. Dec. 20, 2007) (granting leave to conduct expedited discovery in the form of Rule 45 subpoenas seeking documents that would reveal each Doe defendant's "true name, current and permanent addresses and telephone numbers, e-mail addresses, and Media Access Control addresses"). *But see Hard Drive Productions, Inc. v. Does 1–90*, No. C 11-03825 HRL, 2012 WL 1094653, at *7 (N.D. Cal. Mar. 30, 2012) (stating that "the court will not assist a plaintiff who seems to have no desire to actually litigate but instead seems to be using the courts to pursue an extrajudicial business plan against possible infringers (and innocent others caught up in the ISP net)").

Furthermore, third-party subpoenas issued upon ISPs to specifically reveal the identity and contact information of the John Doe Defendants are permissible as long as they are "limited to the name, IP address, and physical address of the John Doe Defendants currently identifiable only by IP address." *See Strike 3 Holdings, LLC v. Doe*, No. 4:21-CV-243-SDJ, 2021 WL 2258737, at *4 (E.D. Tex. June 3, 2021); *see also Ensor v. Does 1–15*, No. A-19-CV-00625-LY, 2019 WL 4648486, at *4 (W.D. Tex. Sept. 23, 2019) (explaining that the discovery sought from website operators was "narrowly tailored to the extent that it [sought] the anonymous Internet user's name, physical address, and IP address" but that the plaintiff's request for "any other information" relating to each anonymous user was not narrowly tailored but was acceptable "only to the extent it [sought] other contact information, i.e., the user's email address").

Here, Alfa Bank has requested significantly more than the name, address, and contact information of the John Doe Defendants. *Compare* Pl.'s Mem. Supp. Mot. Compel, Ex. J (Feb. Krawiec Letter), at App. A (utilizing key terms defined in original subpoena) *with* Pl.'s Mem. Supp. Mot. Compel, Ex. G (Subpoena Duces Tecum without Deposition Directed to April Lorenzen) (Document Subpoena), Schedule A ¶¶ 2-4, 7-13, 16-17, 20-22, 26, 30-32.

Based on the definitions set out in the Document Subpoena (Pl.'s Mem. Supp. Mot. Compel, Ex. G), Alfa Bank has exceeded the narrowly tailored request seeking the identification of a John Doe defendant permitted here. *See, e.g.*, *Strike 3 Holdings*, 2021 WL 2258737, at *4. The Document Subpoena includes thirty-two paragraphs of definitions and twelve paragraphs of instructions. These items are broad and voluminous. For example, Alfa Bank defines the word "[c]ommunication" in the "broadest sense" to mean:

> "*[W]ithout limitation*, any oral or written utterance, notation or statement of any nature whatsoever, by and to whomever made, including, but not limited to, correspondence, conversations, dialogues, discussions, interviews, consultations, agreements, and other understandings between or among two or more persons, or a document made for the purpose of recording communication, idea, statement, opinion, or belief." (Pl.'s Mem. Supp. Mot. Compel, Ex. G (Document Subpoena), at 3.) (Emphasis added.)

Furthermore, Alfa Bank defines the words "Document" and "Computer Data" as follows:

> "4. 'Document' . . . shall include any tangible thing upon which information is or has been stored, recorded, or communicated in whatever medium information can be obtained, including, without limitation, originals, copies or drafts of records, letters, notes, summaries, communications, correspondence, contracts or agreements, memoranda, diaries, calendars, telephone logs, messages (*e.g.*, text messages, SMS/MMS messages), drawings, graphs, charts, presentations, tapes, audio recordings, electronically stored information, electronic mail (*i.e.*, email), photographs or pictures, any data, data compilations or other graphic symbol, and recorded or written materials of any kind whatsoever. The definition also covers and includes those items which did exist but have since been destroyed or lost. Non-identical copies, drafts, and identical

> copies with handwriting are separate "documents" within the meaning of this term.
>
> ". . .
>
> "17. 'Computer data' means DNS lookups, DNS logs, WHOIS registration data, or any other data related to DNS requests, lookups, history, or other network activity, including raw and processed historical DNS queries." *Id.* at 3-5.

These definitions are expansive and far-reaching, especially in relation to other key terms. For instance, Alfa Bank requests access to "[c]ommunications, documents, and computer data *concerning* (i) allegations of secret communications between the Trump Organization and Alfa Bank[.]" (Pl.'s Mem. Supp. Mot. Compel, Ex. J (Feb. Krawiec Letter) (emphasis added).) Alfa Bank defines "[c]oncerning" as "directly or indirectly mentioning, describing, evidencing, constituting, referring to, or relating to." (Pl.'s Mem. Supp. Mot. Compel, Ex. G (Document Subpoena), at 3.) It also defines "[a]llegations of secret communications" and "Trump Organization" as follows:

> "9. 'Allegations of secret communications' means the . . . theory that there was a covert or secret channel of communication between the Trump Organization and Alfa Bank prior to and following the 2016 U.S. presidential election.
>
> ". . .
>
> "20. 'Trump Organization' refers to the group of business entities of which Donald J. Trump is the sole, principal, or majority owner, including Trump Hotels . . . and all Trump real estate and golf interests. This includes its officers, directors, and employees, both former and current; any of its parents, direct or indirect subsidiaries, affiliates, predecessors-in-interest, and successors-in-interest; and any current or former partners, agents, consultants, experts, investigators, principals, representatives, or attorneys of such entities." *Id.* at 4, 6.

Thus, when used in combination with one another to form the discovery requests at issue, these key terms—as defined by Alfa Bank—clearly create requests that are designed to uncover

privileged materials. Furthermore, the requests are broad, excessive, and greater than Alfa Bank's needs. *See Giannini*, 1991 WL 789882, at *2; *see also, e.g.*, *Ensor*, 2019 WL 4648486, at *4.

Clearly, this Court cannot conclude that the request would reasonably lead to the identification of the John Doe Defendants. Furthermore, the vastness of the requests places this Court in the position of acting as a free-standing investigative body, which is not its proper role. *See Houston Business Journal, Inc.*, 86 F.3d at 1213. Therefore, Ms. Lorenzen's objection to the Document Subpoena is sustained.

C

Undue Burden

Ms. Lorenzen argues that both the deposition and document discovery requested under the subpoenas would constitute an undue burden. (Ms. Lorenzen's Mem. Supp. Mot. Quash 16-17.)

When a party objects that a discovery request is unduly burdensome, they must assert that claim with specificity. *See Estate of Chen*, 208 A.3d at 1176-78 (stating evidence of a letter presented by child's psychotherapist that deposing child would "certainly worsen her mental health, and may have negative and lasting consequences to her condition" was "speculative and conclusory" and the party did "not overcome their burden to demonstrate good cause as required under Rule 26(c)"). For example, "in cases where a motion to quash a deposition had been filed based on the potential harm that it could cause to the deponent, the deponent's evidence of potential harm was presented to the court either by affidavit or sworn testimony." *Id.* at 1176-77 n.9.

1

Objection to Deposition Subpoena

Ms. Lorenzen first argues that the deposition requested, requiring that she answer questions for an extended period of time, would be unduly burdensome given her status as a cancer patient

and need to undergo chemotherapy treatment. (Ms. Lorenzen's Mem. Supp. Mot. Quash 16-17.) She states that "her physical condition is such that sitting for a deposition is not feasible and would frankly be cruel." *Id.* at 16.

In response, Alfa Bank "regrets to learn that Lorenzen has been diagnosed with cancer and is undergoing treatment" but argues the situation does not justify quashing the Deposition Subpoena as a matter of law because of the lack of evidence "demonstrating the specific, extraordinary harm the deponent will suffer if the deposition goes forward." (Pl.'s Mem. Opp'n Mot. Quash 27.)

The Rhode Island Supreme Court has recognized cases from other jurisdictions in which "those cases reveal[ed] that the deponents were subject to life-threatening or other serious conditions that would have been significantly exacerbated had the deposition not been quashed." *Estate of Chen*, 208 A.3d at 1177 (citing *Fonner v. Fairfax County, Virginia*, 415 F.3d 325, 327, 331 (4th Cir. 2005) (discussing report stating extensive impact on developmentally disabled deponent such that it would interfere with their functioning in daily life); *Dunford v. Rolly Marine Service Co.*, 233 F.R.D. 635, 636-37 (S.D. Fla. 2005) (discussing deponent's potentially life-threatening acute brain disorder and intensive care at hospital for the same); *Frideres v. Schiltz*, 150 F.R.D. 153, 155 (S.D. Iowa 1993) (discussing deponent's life-threatening hemorrhage and diagnosis of inflammatory bowel disease, which could have been aggravated by emotional distress from deposition); *In re McCorhill Publishing, Inc.*, 91 B.R. 223, 224 (Bankr. S.D.N.Y. 1988) (deponent suffered from severe degenerative arthritis, renal disease, senile dementia, and Alzheimer's disease, had heart failure during proceedings, and a doctor stated deposition could cause further life-threatening heart failure)).

This Court acknowledges that a cancer diagnosis is certainly a "life-threatening" condition and that Ms. Lorenzen should be provided wide latitude with respect to the scheduling and attending of a deposition. Alfa Bank, however, is willing to provide all necessary accommodations to Ms. Lorenzen with respect to scheduling and attending the deposition. *See* Hr'g Tr. 47, July 23, 2021; *see also* Pl.'s Mem. Opp'n Mot. Quash 27. The Court therefore finds that, provided Alfa Bank accommodates Ms. Lorenzen appropriately, the deposition requested has not been shown to be an undue burden.

2

Objection to Document Subpoena

Ms. Lorenzen also objects to the Document Subpoena as unduly burdensome. (Ms. Lorenzen's Mem. Opp'n Mot. Compel 21-24.) She first argues that the requests made by Alfa Bank are duplicative and not narrowly tailored. *Id.* at 22. Second, she argues that Alfa Bank cannot "satisfy the heightened standard for issuing a subpoena to a non-party[,]" analyzing seven factors utilized to make that determination. *Id.* at 22-24 (citing *Rockstar Consortium US LP v. Google, Inc.*, No. 14-91322-FDS, 2015 WL 5972422, at *4 (D. Mass. Oct. 14, 2015)).

In response, Alfa Bank argues that because Ms. Lorenzen has not produced a single document, its requests "are neither unreasonably cumulative nor duplicative." (Pl.'s Mem. Supp. Mot. Compel 16.) It further asserts that, even if there are requests that are deemed cumulative or duplicative, "*some* degree of cumulativeness would not absolve Lorenzen of her obligation to produce responsive documents." *Id.* at 17. Alfa Bank also maintains Ms. Lorenzen fails to "explain how [its] document subpoena presents an undue burden or would cause her to incur unreasonable expense[,]" and emphasizes she can avoid producing any of the documents requested to the extent they are duplicative. *Id.* at 18. Finally, it postulates that, as measured against the issues at stake in

its lawsuit, "Lorenzen's barebones objections fail to excuse her of her discovery obligations here." *Id.*

Ms. Lorenzen bears the burden of supporting her objections. *Berrios v. Jevic Transportation, Inc.*, No. PC 2004-2390, 2012 WL 2648201, at *2 (R.I. Super. June 29, 2012) (citing *Vazquez-Fernández v. Cambridge College, Inc.*, 269 F.R.D. 150, 155-56 (D.P.R. 2010)). She correctly points to requests that are likely duplicative or cumulative in nature. In addition, the requests made by Alfa Bank are broad and not narrowly tailored.

A review of the requests, definitions, and instructions clearly demonstrates that the requests would be duplicative and cumulative for the purposes of Rule 26(b). The instructions provide as follows, in pertinent part:

> "1. These requests shall be deemed to be a request for all documents, whether prepared by you or by any other party or any other person, which are in your physical custody, possession, or control; or that you own in whole or in part; or that you have a right by contract, statute, or otherwise to use, access, inspect, examine, or copy on any terms; or that you have, as a practical matter, the ability to use, access, inspect, examine, or copy on any terms.
>
> "2. Documents produced in response to these requests are to be either produced as they are kept in the usual course of business or organized and labeled to correspond with the categories in this request for production, including, but not limited to, all associated file labels, file headings, and file folders together with the responsive documents from each file, and the owner or custodian of each produced item should be identified. To the extent that the documents are in any computerized, electronic, or digital format or any other medium of communication or storage, the documents shall be downloaded to a hard-drive or DVD without further processing by you, containing all significant material contained in the electronic records including, without limitation, the creation date for the file and the date it was last modified.
>
> "3. Electronically stored information ('ESI') should be produced in its native format, except that ESI may be produced in a reasonably usable form, *i.e.*, single page TIFFS that are searchable by electronic means. In addition, ESI should be produced in a

> logically unitized format. Logical unitization of documents requires the producing party to ensure, among other things, that a particular document captures all of its respective pages and that document relationships, such as a 'parent' document (*e.g.*, a fax cover sheet) and 'children' attachments (*e.g.*, a faxed letter and attachment to the letter), are preserved.
>
> "4. With respect to any documents you produce, each original is to be produced, and each copy is to be produced if it in any way varies from the original by addition or subtraction of marginalia, notations, text or any other information. . . . In addition, each and every draft of any responsive document is to be produced." (Pl.'s Mem. Supp. Mot. Compel, Ex. G (Document Subpoena), at 8-9.)

Further, the modifying language utilized makes the requests far too broad. This much is apparent from a review of definitions for key modifiers—in addition to the one for "concerning" provided above—used in the requests:

> "30. The words "all," "any" and "each" shall be construed in the broadest sense consistent with an interpretation that results in the most expansive response.
>
> ". . .
>
> "32. The word[] . . . 'relate,' or any derivation thereof, shall be deemed to include the following: containing, alluding to, responding to, characterizing, commenting on, describing, discussing, showing, disclosing, explaining, mentioning, analyzing, constituting, comprising, evidencing, setting forth, summarizing, or supporting, either directly or indirectly, in whole or in part, and vice versa." *Id.* at 8.

And in using extremely broad modifying language and words, both of Alfa Bank's requests for production—as contained in the February 15, 2021 letter—effectively ask for the same information multiple times in different ways. For example, Alfa Bank is asking for "[c]ommunications, documents, and computer data, *concerning* . . . analysis of computer data *related to* either the Trump Organization or Alfa Bank," which includes "DNS lookups, DNS logs, WHOIS registration data, or any other data related to DNS requests, lookups, history, or other network activity[.]" (Pl.'s

Mem. Supp. Mot. Compel, Ex. J (Feb. Krawiec Letter), at App. A (emphasis added); Pl.'s Mem. Supp. Mot. Compel, Ex. G (Subpoena Duces Tecum without Deposition) ¶ 17 (defining "[c]omputer data").) It then asks for "[c]ommunications, documents, and computer data . . . *relating to* individuals or entities that queried, accessed, or otherwise performed analyses regarding the Trump Organization or Alfa Bank servers or domains, including *any* DNS queries or other DNS activity in the ZETAlytics DNS database." *Id.* (emphasis added). Notably, "DNS" and "DNS database" are defined as:

> "13. 'DNS' refers to the Domain Name System, the infrastructure on the internet that serves as a global directory that resolves domain names into IP addresses.
>
> ". . .
>
> "16. 'DNS database' means a repository of historical, or passive, DNS records." (Pl.'s Mem. Supp. Mot. Compel, Ex. G (Document Subpoena), at 5.)

Thus, while seemingly distinct from one another, Alfa Bank's requests require Ms. Lorenzen to search for and identify identical documents multiple times, as well as determine whether to produce those documents relative to each definition. As such, Ms. Lorenzen is correct that the ability to avoid producing documents to the extent they are duplicative would "not relieve her of her burden to search, obtain, and review potentially cumulative documents[,]" and are therefore unreasonably cumulative. (Pl.'s Mem. Supp. Mot. Compel 18; Ms. Lorenzen's Opp'n Mot. Compel 22.)

In addition, the factors identified in *Rockstar Consortium US LP v. Google, Inc.*, cited *supra*, weigh in Ms. Lorenzen's favor. *See Rockstar Consortium US LP*, 2015 WL 5972422, at *4 (citing *Legal Voice v. Stormans, Inc.*, 738 F.3d 1178, 1185 (9th Cir. 2013)).[2]

[2] The *Rockstar Consortium* factors are as follows:

First, Alfa Bank's requests are not relevant and amount to an abusive use of discovery mechanisms. Second, the Court is not convinced of Alfa Bank's need for the documents requested because its demands far exceed the scope of discovering the John Doe Defendants' identities, such that the vast majority of the documents requested are unlikely to provide the information it desires. Third, as discussed above, the breadth of Alfa Bank's document requests far exceed the scope of what courts normally compel non-parties to produce.

The fourth and fifth factors favor Alfa Bank because the document requests are limited to specific time frames, and the documents requested are described with a high level of particularity. Yet, the final two factors favor Ms. Lorenzen as there will be a significant burden imposed upon her, given the extremely broad nature of Alfa Bank's requests and the inherently costly process of sifting through many documents to ensure compliance with the Document Subpoena. That demanding and rigorous process will certainly inconvenience Ms. Lorenzen as she goes through chemotherapy treatments in the coming months.

In sum, Alfa Bank's document requests are overly broad, duplicative, and fail to comport with the rules of discovery. Ms. Lorenzen's undue burden objection is sustained.

> "(1) the relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; (6) the burden imposed; and (7) the expense and inconvenience to the non-party." *LSI Corp. v. Vizio, Inc.*, No. 12–mc–91068–DJC, 2012 WL 1926924, at *3 (D. Mass. May 24, 2012).

D

Additional Document Subpoena Objections

1

Ample Opportunity to Obtain Information Sought

Ms. Lorenzen contends Alfa Bank had and continues to have ample opportunity to obtain the information it seeks from other sources. (Ms. Lorenzen's Mem. Supp. Opp'n Mot. Compel 25-26.) She maintains this Court "could and should properly tell Alfa Bank that it will not even consider the propriety of these discovery requests until and unless Alfa Bank explains in a sworn submission to the Senate the now allegedly false statement it submitted in the Trump investigation." *Id.* at 25. Then she argues Alfa Bank has another means of obtaining the identities of the alleged hackers based on its extensive use of subpoenas around the country. *Id.* at 25-26.

Alfa Bank asserts it "has not, by any means, had 'ample opportunity' to obtain the information it seeks here[]" because Ms. Lorenzen is uniquely situated to provide the relevant materials and due to the lack of opportunity to obtain the documents it seeks from the John Doe Defendants or from Ms. Lorenzen. (Pl.'s Mem. Supp. Mot. Compel 16-18.)

This Court does not agree that Alfa Bank should submit a sworn statement regarding the allegedly false statement it submitted in the Trump investigation. The only evidence before the Court in this respect states that Alfa Bank had a "working hypothesis" that the allegedly suspicious activity "was caused by a marketing or spam campaign directed at Alfa Bank employees by a marketing server affiliated with the Trump Organization." (Ms. Lorenzen's Mem. Opp'n Mot. Compel, Ex. A (Senate Intelligence Committee Report), at 792.) Hypotheses are merely theories, not unequivocal statements of fact. *See Hypothesis*, Black's Law Dictionary (11th ed. 2019) (defining hypothesis as both "1. A supposition based on evidence but not proved; a proposed

explanation, supported by evidence, that serves as a starting point for investigation[,]" and "2. A theory or supposition proposed for the sake of debate"). As such, this Court will not question the integrity of Alfa Bank's submissions to the Senate.

Setting Ms. Lorenzen's first contention aside, the Court turns to her argument that the many subpoenas utilized by Alfa Bank demonstrate it has had ample opportunity to obtain the information it seeks here. *See* Ms. Lorenzen's Mem. Supp. Mot. Quash, Ex. C (Fla. Docket) (listing subpoenas requested and issued). The Court agrees with Ms. Lorenzen. Alfa Bank's Complaint was first filed well over a year ago, on June 11, 2020. *See id.* Based on its own statements, Alfa Bank has since "issued over thirty-five subpoenas for document production and eight subpoenas for deposition to individuals and entities located in fourteen different jurisdictions in the United States." (Ms. Lorenzen's Mem. Opp'n Mot. Compel, Ex. F (Alfa-Bank's Motion for Extension of Time to Serve Process on Defendants dated June 21, 2021), ¶ 8.) Alfa Bank also states that it has "received substantial document productions furthering its efforts to identify and locate the John Doe defendants." *Id.* ¶ 9. Since filing its Complaint, Alfa Bank has not identified a single John Doe Defendant despite ample opportunity to do so based on its own submissions to the court presiding over its lawsuit. *See generally* Fla. Docket. With such ample opportunity to achieve the ultimate goal of its current discovery requests—finding actual defendants to fill its John Doe placeholders—this Court is satisfied that Alfa Bank had and will continue to have ample opportunity to get the information it seeks from other sources.

2

Confidentiality

Next, Ms. Lorenzen objects to the Document Subpoena pursuant to Rule 45(c)(3)(B)(i) of the Superior Court Rules of Civil Procedure because Alfa Bank "improperly seeks private business

information from a Rhode Island resident . . . [and] seeks to obtain Zetalystics' [*sic*] confidential and proprietary business information through an individual[,] . . . [which] includes the identities of Zetalytics' [*sic*] clients and the data the company supplies to them." (Ms. Lorenzen's Mem. Opp'n Mot. Compel 26.)

In response, Alfa Bank asserts that Ms. Lorenzen's objection is undeveloped and that she fails to meet her burden to support the same. (Pl.'s Mem. Supp. Mot. Compel 25.) Moreover, Alfa Bank asserts that the confidentiality objection is groundless, "given that Alfa Bank already has offered (and remains willing) to enter into a confidentiality agreement to ensure appropriate protections are in place should Lorenzen produce sensitive documents." *Id.* (citing Ex. J, (Feb. Krawiec Letter); Ex. M (Letter from Margaret E. Krawiec to Gerald J. Petros dated May 7, 2021)).

Ms. Lorenzen's confidentiality objection is premised upon the alleged disclosure of confidential "business information." *Compare* Ms. Lorenzen's Mem. Opp'n Mot. Compel 26, *with* Super. R. Civ. P. 45(c)(3)(B)(i). The request clearly is aimed at securing confidential business information from Ms. Lorenzen. The information requested includes activity on the DNS database. This would include proprietary information.

In its modified requests for production, Alfa Bank seeks to uncover "[c]ommunications, documents, and computer data . . . relating to individuals or entities that queried, accessed, or otherwise performed analyses regarding the Trump Organization or Alfa Bank servers or domains, *including any DNS queries or other DNS activity in the ZETAlytics DNS database*[.]" (Pl.'s Mem. Supp. Mot. Compel, Ex. J (Feb. Krawiec Letter), at App. A (emphasis added).) The Court finds that Ms. Lorenzen raises a valid argument regarding the potential confidentiality implications of these requests and her objection is therefore sustained.

3

Privilege

Ms. Lorenzen next objects to the Document Subpoena as improperly seeking privileged attorney-client communications and attorney work product. (Pl.'s Mem. Supp. Mot. Compel, Ex. I (Letter from Gerald J. Petros to Margaret E. Krawiec dated Oct. 9, 2020), at 2.) She contends this objection is appropriate because "[e]ach request seeks communication between [her] and the 'Relevant Parties,' which includes '[Lorenzen's] attorneys' in violation of the discovery rules[.]" *Id.*

Alfa Bank maintains that Ms. Lorenzen cannot refuse to produce documents "based on a vague, conclusory assertion" that its requests would implicate documents and communications protected by the attorney-client privilege and work product doctrine. *Id.* at 24. It argues that pursuant to Rule 45(d)(2) of the Superior Court Rules of Civil Procedure, a claim of privilege must be "supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." *Id.* Based on Ms. Lorenzen's alleged failure to comply with that requirement, Alfa Bank asserts "[h]er blanket claim of privilege is insufficient to relieve her of her production obligations." *Id.* at 25.

It is well established that "'[t]he attorney-client privilege protects from disclosure only the confidential communications between a client and his or her attorney.'" *State v. von Bulow*, 475 A.2d 995, 1004 (R.I. 1984) (quoting *DeFusco v. Giorgio*, 440 A.2d 727, 731 (R.I. 1982)), *cert. denied*, 469 U.S. 875 (1984). "'The general rule is that communications made by a client to his attorney for the purpose of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure.'" *Id.* (quoting *Haymes v. Smith*, 73 F.R.D. 572, 576 (W.D.N.Y. 1976)). The privilege must be narrowly construed because

it limits the full disclosure of the truth. *Id.* at 1006. The mere existence of a relationship between attorney and client does not raise a presumption of confidentiality. *Id.* at 1005; *see Hearn v. Rhay*, 68 F.R.D. 574, 579 (E.D. Wash. 1975) (citing 8 Wigmore, *Evidence*, § 2311 at 599–603 (McNaughten Rev. 1961)).

The following elements must be met in order to invoke the attorney-client privilege:

> "'(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.'" *Callahan v. Nystedt*, 641 A.2d 58, 61 (R.I. 1994) (quoting *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950)); *see also United States v. Kelly*, 569 F.2d 928, 938 (5th Cir. 1978), *cert. denied*, 439 U.S. 829 (1978); *von Bulow*, 475 A.2d at 1004–05).

On the other hand, the work product doctrine provides that "materials obtained or prepared by an attorney in anticipation of litigation are not * * * discoverable unless production of those materials [is] necessary for the preparation of one's own case." *Henderson*, 966 A.2d at 1246 (citing *Hickman*, 329 U.S. at 511). To determine whether a document is immune under the work product doctrine, courts focus on whether, "in light of the nature of the document or tangible material and the facts of the case, the document can be said to have been prepared or obtained because of the prospect of litigation . . . ." *Cabral v. Arruda*, 556 A.2d 47, 49 (R.I. 1989). As a result, the filing of a lawsuit is not a prerequisite for the successful invocation of the work product doctrine, which embraces material that is prepared "when litigation is merely a contingency." *Fireman's Fund Insurance Co. v. McAlpine*, 120 R.I. 744, 748, 391 A.2d 84, 87 (1978).

In its original requests for production, Alfa Bank asked for all "[c]ommunications [and] documents . . . regarding allegations of secret communications between the Trump Organization and Alfa Bank[,]" including communications with and documents from Ms. Lorenzen's attorneys. (Pl.'s Mem. Supp. Mot. Compel, Ex. G (Document Subpoena), at 11.) The modified requests likely require disclosure of the same documents and information, given the extremely broad nature of those requests. *See* Pl.'s Mem. Supp. Mot. Compel, Ex. J (Feb. Krawiec Letter), at App. A. To the extent any requested communications, documents, or computer data implicate confidential attorney-client communications or work product prepared due to the prospect of litigation, Ms. Lorenzen has valid objections. However, this Court has established procedural rules for making such claims of immunity from production. *See* Super. R. Civ. P. 45(d)(2). While Ms. Lorenzen is afforded special protections from a subpoena as a non-party to Alfa Bank's lawsuit, she is still bound by the duty to comply with Rule 45(d)(2). *See Cusumano*, 162 F.3d at 717; *Exxon Shipping Co.*, 34 F.3d at 779; *Ceroni*, 793 F. Supp. 2d at 1277. In any event, because the instant motions must be decided before the procedural requirements of Rule 45(d)(2) would be implicated, the Court withholds its ruling on these specific objections at this time.

4

Opinion of an Unretained Expert Witness

Ms. Lorenzen objects on the ground that Alfa Bank seeks her opinion as an unretained expert witness pursuant to Rule 45(c)(3)(B)(ii) of the Superior Court Rules of Civil Procedure, which provides protection from discovery to the extent demands require "disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party." *See* Ms. Lorenzen's Opp'n Mot. Compel 26; Super. R. Civ. P. 45(c)(3)(B)(ii). Ms. Lorenzen asserts that the discovery

requests at bar seek "to uncover Ms. Lorenzen's own opinions of the highly technical issues set forth in the Florida complaint[.]" *Id.* Specifically, Ms. Lorenzen highlights Alfa Bank's request for her analysis of computer data related to the Trump Organization and Alfa Bank. *Id.* In response, Alfa Bank contends Ms. Lorenzen is fundamentally mistaken that its demands seek the opinion of an unretained expert witness because the requests are related to "her personal knowledge of matters relevant to the underlying lawsuit." (Pl.'s Mem. Supp. Mot. Compel 25.)

Given the lack of Rhode Island precedent on point, the Court looks to Rule 45 of the Federal Rules of Civil Procedure and related case law, given its substantial similarity to Rule 45 of the Superior Court Rules of Civil Procedure. Kent et al., cited *supra*, § 45:7, at 437 ("Rule 45 is *substantially similar* to Federal Rule 45[.]") (emphasis added).

The Advisory Committee's notes to Rule 45 explain that the ability to object on the basis that a party seeks the opinion(s) of an unretained expert witness via subpoena "provides appropriate protection for the intellectual property of the non-party witness[.]" *See* Fed. R. Civ. P. 45 (advisory committee's note to 1991 amendment). This form of objection was adopted to address "the use of subpoenas to compel the giving of evidence and information by unretained experts." *Id.* The key concern driving the adoption of this rule was that experts would be compelled to testify without adequate compensation. *See id.* ("Experts are not exempt from the duty to give evidence, even if they cannot be compelled to prepare themselves to give effective testimony, . . . but compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services.") (citations omitted). Yet, "[d]iscovery of . . . purely factual information does not comprise the 'intellectual property' of [an expert] and is therefore not protected by Rule 45(c)(3)(B)(ii)." *Arkwright Mutual Insurance Co. v. National Union Fire Insurance Co. of Pennsylvania*, 148 F.R.D. 552, 557 (S.D. W.Va. 1993). In

addition, this jurisdiction permits the disclosure of an unretained expert witness's opinion "if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated[.]" Super. R. Civ. P. 45(c)(3).

The Court agrees with Ms. Lorenzen insofar as the Document Subpoena seeks to uncover her analysis of computer data related to the Trump Organization and Alfa Bank. Ms. Lorenzen is highly skilled in the field of cybersecurity, with a special focus on analyzing DNS data. *See* Pl.'s Mem. Supp. Mot. Compel, Ex. B (April Lorenzen's LinkedIn Page), at 2-5 (listing extensive experience and qualifications). Moreover, cybersecurity is a complex field and DNS data analysis is a very technical endeavor requiring a considerable level of expertise, as evidenced by Alfa Bank's own allegations. *See* Fla. Compl. ¶¶ 42-44. Notably, Alfa Bank fails to define the word "analysis" in its original subpoena. *See generally* Pl.'s Mem. Supp. Mot. Compel, Ex. G (Document Subpoena). Hence, this Court applies the ordinary and plain meaning of that word. *See Analysis*, American Heritage Dictionary 64 (4th ed. 2000) (defining "analysis" as "[t]he separation of an intellectual or material whole into its constituent parts for individual study"); *Analysis*, Webster's Third New International Dictionary 77 (1971) (defining "analysis" as "a detailed examination of anything complex . . . [made] in order to understand its nature or to determine its essential features: a thorough study"). Applying these definitions, it is clear that Alfa Bank seeks the benefit of Ms. Lorenzen's detailed examination of a highly complex set of DNS data without providing any form of compensation. This is contrary to the policy considerations underlying Rule 45. Therefore, its demand for Ms. Lorenzen's expertise and related work product is inappropriate and her objection is sustained.

E

First Amendment Rights of Third Parties

The Court now turns to Ms. Lorenzen's First Amendment objection, arguing that the subpoenas improperly seek to unmask anonymous speakers—i.e., the Anonymous Researchers. (Ms. Lorenzen's Mem. Supp. Mot. Quash 12; Ms. Lorenzen's Mem. Opp'n Mot. Compel 12.)

1

Anonymous Speech

First Amendment protection for anonymous speech was first articulated by the United States Supreme Court in *Talley v. California*, 362 U.S. 60 (1960). *Talley*, 362 U.S. at 64-65. Anonymous speech has "played an important role in the progress of mankind[,]" providing an opportunity for speech for those "motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-42 (1995). Moreover, the decision to remain anonymous "is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342. Based on this well-established First Amendment right to remain anonymous, Ms. Lorenzen asserts that forced compliance with the subpoenas will cause future harm through the invasion of a legally protected interest on behalf of third parties—i.e., the Anonymous Researchers. *See United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (discussing forms of unprotected speech); *see Talley*, 362 U.S. at 64-65 (establishing protection for anonymous speech); *see McIntyre*, 514 U.S. at 341-42 (discussing right to remain anonymous).

As a global argument with respect to both subpoenas, Alfa Bank claims Ms. Lorenzen lacks standing to assert the First Amendment right to remain anonymous on behalf of the Researchers. (Pl.'s Mem. Opp'n Mot. Quash 20-22; Pl.'s Mem. Supp. Mot. Compel 19-22.) Specifically, Alfa

Bank argues Ms. Lorenzen cannot satisfy three requirements: (a) that she has or will suffer an injury-in-fact; (b) that she has a sufficiently close relation to the Anonymous Researchers or John Doe Defendants; and (c) that there is a sufficient hindrance to the Anonymous Researchers' or John Doe Defendants' ability to protect their interests. (Pl.'s Mem. Opp'n Mot. Quash 20-22; Pl.'s Mem. Supp. Mot. Compel 19-22.)[3] It further maintains that First Amendment rights are not implicated here as the instant motions do not stem from a claim that seeks to punish speech—e.g., a defamation claim—and because the Researchers have forgone their right to remain anonymous to the extent they voluntarily disclosed their identities to Ms. Lorenzen. (Pl.'s Mem. Opp'n Mot. Quash 23, 25; Pl.'s Mem. Supp. Mot. Compel 22-24.)

Alfa Bank's argument that the Researchers have forgone their right to remain anonymous is misplaced. (Pl.'s Mem. Opp'n Mot. Quash 20-22.) It alleges that Ms. Lorenzen is one of the Anonymous Researchers and actively participated in the collection of the DNS data purportedly flagged by the John Doe Defendants. *See id.* at 9-11, 25-27. If Ms. Lorenzen is one of the Anonymous Researchers that Alfa Bank contends her to be, then it stands to reason that none of the Researchers have disclosed their identities to a third-party outside that group—thus maintaining their anonymity. Moreover, Alfa Bank has provided no evidence that the Anonymous Researchers disclosed their identities to Ms. Lorenzen. This assertion is based on pure speculation. Therefore, the Anonymous Researchers still maintain their right to remain anonymous under the First Amendment.

[3] Ms. Lorenzen does not raise the issue of the John Doe Defendants' First Amendment rights anywhere in her papers and therefore that issue is not up for consideration by this Court even though Alfa Bank lodges arguments in response to Ms. Lorenzen's motion to that effect. *See* Ms. Lorenzen's Mem. Supp. Mot. Quash 12-16 (arguing only for rights of Anonymous Researchers); *see also* Ms. Lorenzen's Mem. Opp'n Mot. Compel 12-18 (arguing only for rights of Anonymous Researchers).

2

Third-Party Standing

The Court will now consider Alfa Bank's challenge to Ms. Lorenzen's standing. *See* Pl.'s Mem. Opp'n Mot. Quash 20-22; Pl.'s Mem. Supp. Mot. Compel 19-22.

In *Powers v. Ohio*, 499 U.S. 400 (1991), the United States Supreme Court adopted a test to determine whether someone can assert the rights of third parties on their behalf, as an exception to the general rule that an individual "must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers*, 499 U.S. at 410. The three prongs of that test are as follows:

> "The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute, . . . the litigant must have a close relation to the third party, . . . and there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.* at 410-11 (citing *Singleton v. Wulff*, 428 U.S. 106, 112-16 (1976) (citations omitted)).

These requirements "are not constitutionally mandated, but rather stem from a salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." *Craig v. Boren*, 429 U.S. 190, 193 (1976) (citing *Barrows v. Jackson*, 346 U.S. 249, 255, 257 (1953); *Singleton*, 428 U.S. at 123-124 (Powell, J., dissenting)). Application of these requirements is appropriate where "practical obstacles prevent a party from asserting rights on behalf of itself . . . . In such a situation, the Court considers whether . . . the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) (citing *Craig*, 429 U.S. at 193-94).

a

Injury in Fact

In Rhode Island, the injury-in-fact requirement requires a showing that one has suffered "'an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical.'" *Pontbriand v. Sundlun*, 699 A.2d 856, 862 (R.I. 1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). When a person asserting injury does so with respect to future harm, the "threatened injury must be certainly impending[,]" and allegations of possible future injury are not sufficient. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotations omitted). Moreover, our Supreme Court has made it clear that "'[t]he line is not between a substantial injury and an insubstantial injury[,]'" but instead "'between injury and no injury.'" *Pontbriand*, 699 A.2d at 862 (quoting *Matunuck Beach Hotel, Inc. v. Sheldon*, 121 R.I. 386, 396, 399 A.2d 489, 494 (1979)).

It is alleged that the John Doe Defendants engaged in a variety of actions as a "Disinformation Enterprise," subjecting them to liability under Florida's RICO Statute. *See generally* Fla. Compl. ¶¶ 67-82. Alfa Bank's lawsuit is thus grounded in Section 772.104 of the Florida Statutes, a provision that provides a cause of action against those "[e]mployed by, or *associated with*, any enterprise to conduct or participate, directly *or indirectly*, in such enterprise through a pattern of criminal activity[.]" Fla. Stat. §§ 772.104(1), 772.103(3) (1986) (emphasis added).[4] Notably, Section 772.102(4) defines a "[p]attern of criminal activity" as "engaging in at

[4] Florida—the forum state for the instant action—takes a somewhat broad approach to defining the term "enterprise" for purposes of RICO actions. *See Gross v. State*, 765 So.2d 39, 45, 47 (Fla. 2000). In fact, Florida's jury instruction for this key term defines an "enterprise" as follows:

> "*[A]ny individual*, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, *or group of*

least two incidents of criminal activity that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents[.]"

Alfa Bank asserts that "[d]espite the nonpublic nature of DNS data, the researchers disclosed excerpts of their underlying data to news media outlets, including *The New York Times*, *Washington Post*, *Reuters*, *Daily Beast*, *Vice*, *The Intercept*, and *Slate*." (Fla. Compl. ¶ 50.) Because the Florida RICO statute only requires an association with an enterprise engaged in a pattern of criminal activity, Alfa Bank's assertions demonstrate the information it seeks to obtain from Ms. Lorenzen implicates her right to remain anonymous and her rights as a potential defendant accused of criminal activity. *See generally* Fla. Compl. ¶¶ 69-71, 73, 77-79, 81 (stating, in very broad terms, the nature, general composition, and alleged activities of the "Disinformation Enterprise," to which the John Doe Defendants purportedly belong); *see id.* ¶ 71 ("Alternatively, or in addition, Defendants, through the scheme outlined above, willfully, knowingly, and without authorization or exceeding authorization *accessed or caused to be accessed* any computer, computer system, computer network or electronic device with knowledge that such access is unauthorized or the manner of use exceeds authorization[.]") (emphasis added); *see* Pl.'s Mem. Opp'n Mot. Quash 26-27 ("Lorenzen likely controls DNS databases that housed the relevant [DNS] data, including data fabricated . . . and accessed by Tea Leaves[.]"); *see id.* at 26 ("Lorenzen's testimony will shed light on the initial set of fabricated DNS data to which Defendants pointed Tea Leaves or others; how that data was accessed; and how Defendants

> *individuals associated in fact although not a legal entity*; and it *includes illicit as well as licit enterprises* and governmental, *as well as other, entities*." *Id.* at 47 (quoting Fla. Stat. § 895.02(3) (1993) (emphasis added)).

developed and executed the plan to manipulate the DNS data."); *see also id.* (arguing that "Lorenzen is closely connected to Tea Leaves, other Anonymous Researchers, and other known individuals who played important roles in reviewing, analyzing, and distributing the DNS data fabricated by Defendants" and that "if commentators are correct, Lorenzen might well be Tea Leaves herself[,]" before stating that "Tea leaves . . . is the only known person likely to have had direct contact with Defendants").

To be sure, it is accepted for purposes of this motion that Ms. Lorenzen is one of the Anonymous Researchers, meaning she "helped uncover this [DNS] communication channel and then disclosed it to the press and government agencies[.]" (Hr'g Tr. 4, July 23, 2021.) Ms. Lorenzen's First Amendment rights are clearly at stake and Alfa Bank's quest to attain information that could implicate her in a criminal enterprise means Ms. Lorenzen faces a certainly impending injury-in-fact if forced to comply with either subpoena. *See Whitmore*, 495 U.S. at 158. In sum, Alfa Bank's contentions that Ms. Lorenzen does not have standing because she will not suffer injury is contrary to the facts presented. Consequently, Ms. Lorenzen satisfies the first requirement for third-party standing.

b

Close Relationship

To grant standing to assert the rights of third parties, the *Powers* test also requires a close relationship between the person asserting the right and the third-party, "such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton*, 428 U.S. at 114-15.

Alfa Bank makes self-defeating allegations here as well because it alleges that Ms. Lorenzen is, at the very least, one of the Anonymous Researchers. *See* Pl.'s Mem. Supp. Mot.

Compel 14 ("Lorenzen *is at the apex of the events at the heart of the Florida lawsuit*, given her likely familiarity with the Anonymous Researchers . . . and the likelihood that she controlled DNS databases from which some of the relevant DNS data was sourced.") (emphasis added); *see id.* at 9 ("Alfa Bank has reason to believe that some of the relevant DNS data to which Tea Leaves had access was sourced from DNS databases controlled by Lorenzen."); *see also* Fla. Compl. ¶¶ 42-43 (describing group of Anonymous Researchers as a group including "both academics and professionals, some of whom reportedly worked at cybersecurity firms with close ties to federal agencies and accordingly had unparalleled access to 'nearly comprehensive logs of communications between servers'") (citation omitted). Thus, any subsequent argument that Ms. Lorenzen does not have a sufficiently close relationship with the Anonymous Researchers for purposes of third-party standing is inconsistent with their prior allegations.

What is more, Ms. Lorenzen has demonstrated that she is an effective proponent of the Anonymous Researchers' First Amendment rights. She has briefed the Court at length as to the constitutional issues presented by Alfa Bank's demands and vigorously advocated to protect the Researchers' anonymity. As such, this Court finds Ms. Lorenzen has a sufficiently close relationship with the Anonymous Researchers.

c

Hindrance to Self-Assertion

The final prong of the *Powers* test examines the ability of the Anonymous Researchers to assert their own rights. *Singleton*, 428 U.S. at 115-16. Even where the relationship between the proponent of the rights in question and the third parties is a close one, the general requirement that parties assert their own rights remains intact. *Id.* at 116. However, if there is a legitimate obstacle to the ability of an individual to assert their rights, "the third party's absence from court loses its

tendency to suggest that [their] right is not truly at stake, or truly important to [them], and the party who is in court becomes by default the right's best available proponent." *Id.*

Claims to the protections of anonymous speech ordinarily arise when a plaintiff in a defamation action seeks to subpoena a non-party—e.g., an Internet Service Provider (ISP)—to identify John Doe defendants that are anonymous posters on a third-party website. *See, e.g.*, *Dendrite International Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (plaintiff in defamation action seeking discovery compelling a non-party ISP to identify John Doe defendants who posted messages on the ISP's bulletin board); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (plaintiff seeking the same). *But see Cor Clearing, LLC v. Investorshub.com, Inc.*, No. 4:16mc13-RH/CAS, 2016 WL 3774127, at *4 (N.D. Fla. May 11, 2016) (denying a motion to compel because plaintiff did not allege a cause of action against the anonymous posters). In those cases, there is a general consensus that the party seeking discovery "must make reasonable efforts to notify the speaker by, for example, attempting notice via the same medium used by the speaker to send or post the at-issue message." *See, e.g.*, *East Coast Test Prep LLC v. Allnurses.com, Inc.*, 167 F. Supp. 3d 1018, 1024 (D. Minn. 2016) (citing *Doe I v. Individuals*, 561 F. Supp. 2d 249, 254 (D. Conn. 2008)). This requirement is important because it "gives the speaker the opportunity to seek to quash the discovery request on their own." *Id.*

Here, the Court has not been presented with any information regarding efforts to put the Anonymous Researchers on notice of Alfa Bank's efforts to reveal their identities. The record clearly establishes that at least some of the Anonymous Researchers were in contact with news organizations and active online while sharing their analytical findings regarding the DNS data—representing a medium through which Alfa Bank could potentially notify them that their First Amendment rights are in jeopardy. *See* Fla. Compl. ¶¶ 43-46, 50. Without any factual basis to

conclude that Alfa Bank even attempted to provide notice to the Anonymous Researchers, this Court is unconvinced that they could come forward in their own capacity and challenge the subpoenas anonymously as Alfa Bank suggests they should. (Pl.'s Mem. Opp'n Mot. Quash 22; Pl.'s Mem. Supp. Mot. Compel 22.) Moreover, the Anonymous Researchers will suffer a detriment in that their right to remain anonymous will be stripped from them and would likely become subject to Alfa Bank's discovery tactics as a result. The Court therefore finds that there is a sufficient hindrance to the Anonymous Researchers' ability to assert their own First Amendment rights here.

Because all three prongs of the *Powers* test are satisfied, Ms. Lorenzen appropriately asserts the First Amendment rights of the Anonymous Researchers with respect to both subpoenas. *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, 941 (Fla. 2002) (quoting *Powers*, 499 U.S. at 410).

3

First Amendment Objection

The First Amendment was designed to ensure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). However, "it is well understood that the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571 (1942). It necessarily follows that the right to speak anonymously is not absolute. *Id.* To help with the determination of First Amendment issues and provide the appropriate level of protection to various forms of speech, the United States Supreme Court "created a rough hierarchy in the constitutional protection of speech. *Core political speech* occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of

second-class expression; obscenity and fighting words receive the least protection of all." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) (emphasis added). The term "core political speech" is defined as "interactive communication concerning political change[.]" *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988); *accord Speech*, Black's Law Dictionary (11th ed. 2019).

It is clear the Anonymous Researchers were engaged in core political speech because their communications concerned one of the most important forms of political change: the Presidential Election process. Therefore, it follows that they are to be accorded the greatest level of First Amendment protection. *R.A.V.*, 505 U.S. at 422 (Stevens, J., concurring in the judgment); *Meyer*, 486 U.S. at 421-22; *accord Speech*, Black's Law Dictionary (11th ed. 2019). Consequently, this Court will now address Ms. Lorenzen's First Amendment objection on behalf of the Anonymous Researchers.

4

Determination of Appropriate Standard

Ms. Lorenzen argues that the subpoenas improperly seek to unmask anonymous speech. (Ms. Lorenzen's Mem. Supp. Mot. Quash 12; Ms. Lorenzen's Mem. Opp'n Mot. Compel 12.) As such, she contends this Court should "adopt the approach taken by courts around the country when faced with John Doe complaints in the context of anonymous speech . . . [and] require a substantial showing from Alfa Bank that it possesses a claim that can survive summary judgment as a precedent for allowing any discovery." (Ms. Lorenzen's Mem. Supp. Mot. Quash 12; Ms. Lorenzen's Mem. Opp'n Mot. Compel 12.)

Alfa Bank contends that Rhode Island has never imposed a heightened standard on the determination of discovery disputes implicating anonymous speech protected by the First

Amendment and that this Court should not be the first to adopt such a standard in Rhode Island. (Pl.'s Mem. Opp'n Mot. Quash 22-23; Pl.'s Mem. Supp. Mot. Compel 22-24.) With respect to the Deposition Subpoena, Alfa Bank maintains that Ms. Lorenzen's counsel "can object on the record to the extent the First Amendment supposedly is implicated by any questioning." (Pl.'s Mem. Opp'n Mot. Quash 23.)

There is no set standard established to analyze the propriety of using discovery mechanisms to unmask anonymous speech in Rhode Island. Other courts have applied standards that "range from a 'good faith' assertion of a claim for relief to a showing commensurate with that needed to withstand a motion for summary judgment." *Taylor v. John Does 1-10*, No. 4:13-CV-218-F, 2014 WL 1870733, at *2 (E.D.N.C. May 8, 2014) (citing *In re Anonymous Online Speakers*, 661 F.3d 1168, 1174–76 (9th Cir. 2011); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 449-57 (Md. 2009)). The most common approach used to determine whether a plaintiff can unmask anonymous speakers are the application of either a 12(b)(6) motion to dismiss standard or a Rule 56 motion for summary judgment standard. *See, e.g.*, *Dendrite International, Inc.*, 775 A.2d at 770-71; *In re Indiana Newspapers, Inc.*, 963 N.E.2d 534, 552 (Ind. Ct. App. 2012); *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999).

The importance of the First Amendment right to freedom of speech—especially when core political speech is involved—cannot be overstated. *See Iancu v. Brunetti*, 139 S.Ct. 2294, 2318 (2019) ("Freedom of speech is a cornerstone of our society[.]"); *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 503 (2007) ("It is perhaps our most important constitutional task to ensure freedom of political speech."); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled* on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969))

("Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech 'is the matrix, the indispensable condition, of nearly every other form of freedom.'").

The Rhode Island 12(b)(6) motion to dismiss standard differs substantially from the federal standard. *See Barrette v. Yakavonis*, 966 A.2d 1231, 1234 (R.I. 2009). In Rhode Island, "'[t]he sole function of a motion to dismiss is to test the sufficiency of the complaint.'" *Palazzo v. Alves*, 944 A.2d 144, 149 (R.I. 2008) (quoting *R.I. Affiliate, ACLU, Inc. v. Bernasconi*, 557 A.2d 1232, 1232 (R.I. 1989)). In making its Rule 12(b)(6) determination, a court "'assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs.'" *Giuliano v. Pastina, Jr.*, 793 A.2d 1035, 1036-37 (R.I. 2002) (quoting *Martin*, 784 A.2d at 297-98). Under Rhode Island's notice pleading standard, "[a]ll that is required is that the complaint give the opposing party fair and adequate notice of the type of claim being asserted." *Haley v. Town of Lincoln*, 611 A.2d 845, 848 (R.I. 1992). "[A] Rule 12(b)(6) motion to dismiss is appropriate 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" *Barrette*, 966 A.2d at 1234 (internal quotation omitted).

On the other hand, "'[s]ummary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously.'" *Cruz v. DaimlerChrysler Motors Corp.*, 66 A.3d 446, 451 (R.I. 2013) (quoting *DeMaio v. Ciccone*, 59 A.3d 125, 129 (R.I. 2013)). Indeed, "[s]ummary judgment is appropriate only when the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as [a] matter of law.'" *Sola v.*

Leighton, 45 A.3d 502, 506 (R.I. 2012) (quoting *Plunkett v. State*, 869 A.2d 1185, 1187 (R.I. 2005)).

Because a motion to dismiss standard only requires giving notice of the general claim asserted, limits the examination to the four corners of the complaint, and is only granted under exceptional circumstances, it provides advantages to plaintiffs that are too great for the purposes of determining whether they can utilize discovery mechanisms to unmask anonymous speech. Adopting such a standard in this context would be far too protective of abusive discovery tactics like those employed by Alfa Bank. As such, this Court is concerned that imposing this standard will unduly chill constitutionally protected speech. This Court believes that the most viable option available is instead a Rule 56 motion for summary judgment standard.

Unlike the Rule 12(b)(6) standard, Rhode Island's summary judgment standard under Rule 56 strikes the appropriate balance between protecting the interests of anonymous speakers asserting First Amendment rights and permitting discovery to advance claims toward final resolution. That said, utilizing that standard in the absence of an actual motion for summary judgment requires explanation as to what is required of a plaintiff requesting use of discovery mechanisms to attain the identities of anonymous speakers.

In support of her argument for the Court to apply a summary judgment standard, Ms. Lorenzen relies on *Cahill*, cited *supra*. While *Cahill* is distinguishable from the case at bar because it dealt with a defamation suit,[5] that difference bolsters the logic in adopting a strong standard to

[5] In *Cahill*, to resolve the issue of which standard to apply, the Delaware Supreme Court balanced the right to speak anonymously against the right to protect one's reputation. *Cahill*, 884 A.2d at 456. Considering the wide spectrum of standards available—with a special focus on the 12(b)(6) motion to dismiss standard and the Rule 56 summary judgment standard—the court adopted a "*prima facie*" summary judgment standard to protect against chilling anonymous speech. *Id.* at 457-59.

strike a balance between the interests of the Anonymous Researchers and Alfa Bank because the activities of the Anonymous Researchers—as alleged by Alfa Bank—were wholly legal actions and free from the taint of being potentially defamatory. *See* Fla. Compl. ¶¶ 41-50; *Cahill*, 884 A.2d at 461.

Under the *Cahill* test, a plaintiff must first make efforts to notify anonymous speaker(s) that they are subject to a subpoena or application for an order of disclosure and allow them a reasonable opportunity to challenge the subpoena or application. *Cahill*, 884 A.2d at 461. To satisfy this notice requirement, a plaintiff must submit evidence of its efforts to notify the anonymous speakers and, if such notice is effected, allow a reasonable amount of time for them to challenge the discovery demands in question. *Id.* at 461. Second, the plaintiff must be able to survive a motion for summary judgment. *Id.* at 463.

The notice requirement adopted in *Cahill* is appropriate under circumstances where anonymous speech is implicated, and this Court finds that evidence of efforts to effectuate such notice are required under these circumstances. *See id.* at 461. Additionally, under the Rhode Island standard for summary judgment, the moving party "bears the initial burden of establishing the absence of a genuine issue of fact." *McGovern v. Bank of America, N.A.*, 91 A.3d 853, 858 (R.I. 2014) (citation omitted). The Court "views the evidence in the light most favorable to the nonmoving party[,]" *Mruk v. Mortgage Electronic Registration Systems, Inc.*, 82 A.3d 527, 532 (R.I. 2013), and "does not pass upon the weight or the credibility of the evidence[.]" *Palmisciano v. Burrillville Racing Association*, 603 A.2d 317, 320 (R.I. 1992). Thereafter, "'the nonmoving party bears the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions

or mere legal opinions.'" *Mruk*, 82 A.3d at 532 (quoting *Daniels v. Fluette*, 64 A.3d 302, 304 (R.I. 2013)).

Fairness requires that this Court provide the parties with a full opportunity to address this additional aspect of the standing analysis, given its adoption of this two-part test. As such, the Court reserves its ruling on Ms. Lorenzen's First Amendment objection pending additional submissions and argument from the parties relative to the standard articulated above.

IV

Conclusion

For the reasons stated above, this Court grants Ms. Lorenzen's Motion to Quash the Deposition Subpoena served upon her and denies Alfa Bank's Motion to Compel the requests contained in its February 15, 2021 letter. Counsel shall enter the appropriate order.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**AO Alfa Bank v. John Doe, et al.**
CASE NO:	**WM-2020-0361**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**November 9, 2021**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**Carl Fumarola, Esq.**
For Defendant:	**Gerald J. Petros, Esq.; Ryan M. Gainor, Esq.; Steven J. Boyajian, Esq.; William M. Daley, Esq.; Daniel F. Sullivan, Esq.**